SUPREME COURT, U. S.

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L. ROOAK, JR.

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-180

SOL C. SIEGEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ETHEL B. SIEGEL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Sol C. Siegel and Ethel B. Siegel pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cases on June 5, 1974.

Opinions and Proceedings Below.

The memorandum opinion of the Court of Appeals (Appendix "A", *infra*) is unreported. No opinion was rendered by the District Court but its minute order granting respondent's[1] motion for summary judgment

[1]For convenience herein, petitioners may be referred to as "taxpayers" and respondent may be referred to as "the government."

is attached hereto as Appendix "B". The operative opinion of the Court of Appeals (Appendix "C", *infra*) was rendered in the first appeal by the government and is reported at 464 F.2d 891 (1972).

An order denying rehearing and to modify the original opinion pursuant to a motion for clarification (Appendix "D", *infra*) was unreported. No opinion was rendered by the District Court in connection with its earlier decision but its Findings of Fact and Conclusions of Law (not reported) and Judgment, are attached hereto as Appendix "E", *infra*. A prior petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit (Supreme Court of the United States, October Term, 1972, No. 72-750) was dismissed by taxpayers as premature.

Jurisdiction.

The Judgment and Order of the Court of Appeals was made and entered on June 5, 1974. (Appendix "F", *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented.

Where a Judgment was entered in the United States District Court on taxpayers' cross-motion for summary judgment, rendering moot a hearing upon the existence of genuine issues of fact in opposition to the government's motion for summary judgment, did the Court of Appeals deny due process to taxpayers by reversing the District Court's judgment and ordering the District Court to enter judgment for the government without a hearing as to the existence of genuine issues of fact which would bar the granting of the government's original motion for summary judgment?

Rule Involved.

The pertinent portion of Rule 56, Federal Rules of Civil Procedure, is set forth in Appendix "G", *infra*.

Statement.

These cases arose out of claims for refunds of income taxes, plus interest thereon, in the aggregate amount of $146,371.00 previously paid by taxpayers as transferees of Sol C. Siegel Productions, Inc. ("Productions").

The government filed a motion for summary judgment accompanied by a stipulation of agreed facts and attachments thereto. Taxpayers filed a statement of genuine issues and affidavits in support thereof, as well as a memorandum of points and authorities, all in opposition to the government's motion. In addition, taxpayers filed a cross-motion for summary judgment. The District Court (Honorable Jesse W. Curtis) entered judgments for taxpayers on their cross-motion on April 3, 1970, rendering moot the government's motion. The government appealed and the United States Court of Appeals for the Ninth Circuit entered a judgment reversing the District Court's judgment.

The penultimate paragraph of the Court of Appeals' opinion seemed to embrace directions to the District Court to enter judgment for the government. Because taxpayers believed that such directions were inconsistent with the rule of *Fountain v. Filson*, 336 U.S. 681 (1949) and *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525 (1958) as well as several decisions of various United States Courts of Appeals including the Ninth Circuit, taxpayers moved for clarification on this point in conjunction with a petition for

rehearing. The rehearing was denied. Although the Court of Appeals modified its original opinion by deleting certain language, it ignored taxpayers' request for an express statement as to whether or not it was directing that judgment be entered for the government. To preserve their rights, taxpayers were required to assume the worst and filed a petition to this Court for a writ of certiorari to the Court of Appeals. On remand, the District Court assumed it had been directed to enter judgment for the government, and did so. However, at request of taxpayers, the District Court set aside that judgment and submitted for decision the government's original motion for summary judgment. Because of this action, taxpayers dismissed their petition for a writ of certiorari as then being moot. Thereafter, as indicated by Appendix "A", *infra*, the District Court entered summary judgment for the government, on the basis that the Court of Appeals had directed it to enter judgment for the government.

In terms of due process and administration of justice, the results were as follows: taxpayers were in the District Court in support of their successful cross-motion for summary judgment, then in the Court of Appeals unsuccessfully to defend that judgment, next, in the Court of Appeals unsuccessfully inquiring whether they were to have an opportunity to assert the existence of genuine issues of fact to defeat the government's motion for summary judgment, next in the Supreme Court because the Court of Appeals declined to state whether or not it had in fact directed the lower court to enter judgment in favor of the government, next back to the District Court when that court decided to consider whether or not it was free to determine the existence or non-existence of genuine issues of

fact, and finally back to the Court of Appeals when the District Court concluded that it was not so free but was bound by the appellate mandate to enter judgment for the government. In spite of this extensive multiplicity of judicial proceedings, taxpayers have yet to have their day in court on the overriding issue in the summary judgment procedure, that is, the existence or non-existence of genuine or triable issues of fact.

A summary of the material facts relevant to the cases below is as follows:

Sol C. Siegel and Ethel B. Siegel owned approximately 90 percent of the stock of Productions and had received such percentage of its assets distributed in liquidation. The Commissioner of Internal Revenue made timely assessments of income taxes against Productions in the aggregate amount of $163,418.35 for its fiscal years ending May 31, 1962 and 1963. The taxpayers, acknowledging their status as transferees without acknowledging liability, paid approximately 90 percent of the amounts assessed, and thereafter filed timely claims for refund of the amounts thus paid. These claims were rejected by the Commissioner of Internal Revenue and the taxpayers timely instituted these actions.

Productions was a California corporation organized in June, 1954, for the production of motion picture photoplays. It reported its income upon the basis of a fiscal year ending May 31, using the cash receipts and disbursements method of accounting.

In April, 1955, Productions entered into agreements with Loew's, Inc. (hereinafter "Loew's") for the production of motion picture photoplays to be jointly owned by Loew's and Productions. Loew's was to have

the exclusive right to distribute the photoplays for a term of twenty-one years. Thereafter, subject to various mutual options, Productions and Loew's could independently of each other exercise such rights as the law afforded tenants in common of a copyright. [R. 64, 170, 81-248.][2]

With respect to the receipts and disbursements of gross receipts derived from the distribution of each photoplay, Loew's was to receive, account for, and disburse all receipts in the following order of priority: first, Productions' share of the negative cost was to be recouped; second, Loew's distribution fees and expenses were to be paid; third, Loew's share of the negative cost was to be recouped. Receipts of film rentals in excess of the foregoing were defined as "net profits" to be proportionately shared. Under these contracts, neither Loew's nor Productions were to receive compensation for the services, financing or facilities provided by either in the production of the photoplays. Loew's rewards were to be derived from its compensation for distribution and its share of the defined net profits. Productions' rewards were to be derived only from its share of the defined net profits. There was no obligation on the part of Loew's or any other person to compensate Productions for services which it rendered in the production of the photoplays. [R. 65, 207-208.]

By April, 1957, Productions had produced and delivered to Loew's for distribution, three photoplays. [R. 66.]

Loew's maintained the books and controlled receipts and expenditures during the course of production. Prior to April 10, 1958, the officers of Productions

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[2]Record references are to the Ethel B. Siegel record.

had raised several questions regarding the accuracy of Loew's accounting. Prior to April 10, 1958, officers and representatives of Productions had entered into discussions with officials of Loew's concerning these matters. At the time of these discussions, Loew's was desirous of hiring Sol C. Siegel individually as an executive in its own organization, and was therefore anxious to settle any disputes or differences of opinion that had arisen between it and Productions. [R. 67.]

On April 10, 1958 agreements were entered into by Loew's and Productions as follows:

Under one, an employment agreement, it was agreed that Loew's would employ Sol C. Siegel as its executive in charge of its own motion picture production and studio operations for a term of three years, with an option in Loew's to renew for an additional term. Siegel entered into this employment agreement by Loew's on April 10, 1958, and continued in its employment until June, 1962. [R. 68.]

To settle the dispute as to Loew's accounting [R. 68], a separate agreement between Productions and Loew's, dated April 10, 1958 (the "Second Amendatory Agreement"), amended the original Production Distribution Agreement. Prior to April 10, 1958, a fourth photoplay, "MERRY ANDREW", had been completed by Productions and delivered to Loew's, and on March 27, 1958 had been released by Loew's to theatres. [R. 69.] For the purpose of recouping costs of production and distribution and to determine defined net profits, "MERRY ANDREW" was grouped in a unit with another photoplay called "END OF THE WORLD", then in process of production. With respect to this arrangement, particularly relevant to

the underlying issues herein, the Second Amendatory Agreement provided:

> "5. . . . With respect to Unit A, the distributor agrees that if both of the photoplays of said Unit shall be completed and delivered to Distributor, Productions' share of the aggregate net profits from said Unit shall not be less than THREE HUNDRED THOUSAND DOLLARS ($300,000.00) . . ."

As to any such payments made by Loew's, paragraph 5 also provided:

> "If the Distributor shall be required to pay Productions any amount on account of its undertaking hereunder and shall pay said amount, such shall be deemed to constitute a non-returnable payment to Productions *on account of its share of the net profits* from the photoplays in said Unit A. Subject only to the payments provided for in (a) and (b) above, the Distributor shall have the right to recoup any amounts so paid on account of its said undertaking out of Productions' share of the net profits from one or both (as the case may be) of the photoplays in said Unit . . ." (Emphasis added.) [R. 69-74.]

On or about February 2, 1959, Productions completed and delivered to Loew's the second photoplay of Unit A. [R. 74.]

On February 27, 1961, proceedings were commenced for the voluntary dissolution of Productions under the provisions of the California Corporations Code. On March 21, 1961 pursuant to the liquidation proceedings, Productions assigned to taxpayers un-

divided interests in the corporation's ownership of "MERRY ANDREW" and "THE WORLD, THE FLESH AND THE DEVIL", the Unit A photoplays. [R. 75-76.]

Thereafter, Loew's paid to Sol C. Siegel, John Patrick and Ethel B. Siegel, the then owners of the one-third undivided interest in the photoplays, an aggregate of $300,000 pursuant to the provisions of paragraph 5(b) of the Second Amendatory Agreement. [R. 67.]

On or about February 1, 1967, the Commission of Internal Revenue entered an assessment against Productions for Federal income taxes on the theory that the guarantee contained in the Second Amendatory Agreement of minimum defined net profits payable in respect of the Unit A photoplays in fact constituted compensation for Productions' services in producing these photoplays. Accordingly, it contended that the ultimate payment to the owners of those photoplays (Productions' stockholders-assignees) constituted income anticipatorily assigned. In defense to this contention, taxpayers contended that the guaranteed receipts constituted guaranteed income with respect to the use of taxpayers' property and therefore taxable to them as the owners of such property.

The ultimate issue before the lower court was, therefore, to determine what the contracting parties intended, that is, compensation to Productions for services, or payment to the owner of property for the use thereof. In the *summary judgment proceedings*, however, the issue was simply to determine whether there were genuine issues of fact on either side to support such conflicting factual contentions.

REASONS FOR GRANTING THE WRIT.

SUMMARY.

1. The Court of Appeals for the Ninth Circuit has rendered a decision in conflict with the decision of other Courts of Appeals, in conflict with an applicable decision of this Court, and has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

2. By departing from *stare decisis,* the Court of Appeals for the Ninth Circuit has deprived petitioners of due process. If the decision is permitted to stand, it could have the effect of similar denial of due process to future litigants, because inherent in the decision is the proposition that a successful summary judgment motion which fails to survive appeal may entail a forfeiture of a litigant's day in court to adduce facts constituting a defense under his opponent's theory.

3. Until the decision of the Court of Appeals for the Ninth Circuit in the instant case, a party to litigation was free to assert by motion or cross-motion for summary judgment a right to judgment without jeopardizing his right:

> i. To demonstrate that if his successful theory in the trial court be deemed erroneous by the Court of Appeals, he has facts available nevertheless to succeed even upon the different theory of his opponent or of the appellate court;
>
> ii. to have, in resisting his opponent's motion, the benefits of inferences which may be reasonably drawn in his favor;
>
> iii. to have fact findings made in the trial court and not in the Court of Appeals.

The decisions of the courts have, until now, been virtually unanimous in preserving such rights to litigants. To abrogate them could drastically affect the process of administration of justice by virtually eliminating the summary judgment procedure.

ARGUMENT.

In the leading case of *Byrd v. Blue Ridge Rural Electric Cooperative,* 356 U.S. 525 (1958), the United States Supreme Court held that the Court of Appeals erred in directing judgment for one litigant after it had interpreted an applicable statute differently from the interpretation rendered by the District Court. Justice Brennan, delivering the opinion of the Court, stated that:

> "The petitioner was fully justified in that circumstance in not coming forward with proof of his own at that stage of the proceedings, for he had nothing to meet under the District Court's view of the statute. He thus cannot be penalized by the denial of his day in court to try the issue under the correct interpretation of the statute." 356 U.S. at 533.

In *Fountain v. Filson,* 336 U.S. 681 (1949), this Court reached the conclusion that an appellate court, on reversing summary judgment for one party, could not properly direct the trial court to enter judgment for the other party on an issue not considered by the trial court. In its rationale, the court, at page 683, pointed out that a party who had won in the trial court could not "be deprived of any opportunity to remedy the defect which the appellate court discovered in his case."

Such deprivation occurred in the instant case. If the District Court here had accurately predicted the

rationale of the Court of Appeals in rejecting taxpayers' cross-motion for summary judgment, it would then have been required to inquire into the propriety of the government's original motion for summary judgment by considering whether a genuine issue of fact existed under the government's theory of the case. Moreover, in such consideration, the trial court would be required to draw all reasonable inferences favorable to taxpayers and unfavorable to the government. See *Severson v. Fleck*, 251 F.2d 920, 923 (8th Cir. 1958); *Northwestern Auto Parts Co. v. Chicago B. & Q. R. Co.*, 240 F.2d 743, 746 (8th Cir. 1957); *Hart v. Johnson*, 389 F.2d 239, 242 (6th Cir. 1968); *Louis Schlesinger v. Kresge Foundation*, 388 F.2d 208, 212 (3d Cir. 1968); *American Mfrs. M.I. Co. v. American Broadcasting-Para. Th.*, 388 F.2d 272, 279 (2d Cir. 1967); *S. J. Groves & Sons Company v. Ohio Turnpike Commission*, 315 F.2d 235, 238 (6th Cir. 1963); *Parker v. Twentieth Century-Fox Film Corp.*, 3 Cal. 3d 176 (1970).

In *Helms v. Duckworth*, 249 F.2d 482 (D.C. Cir. 1957) not only did both parties move for summary judgment but both parties asserted that there were no factual disputes as to the contract or related agreements. Notwithstanding that, in considering whether to direct the District Court upon remand to enter judgment for the successful appellate party who lost in the trial court, Judge (now Chief Justice) Burger, speaking for the Court, stated, at page 488:

> ". . . the Supreme Court has cautioned appellate courts when reversing a summary judgment not to direct entry of a similar judgment for appellant 'on a new issue as to which the opposite party had no opportunity to present a defense be-

fore the trial court.' *Fountain v. Filson,* 1949, 336 U.S. 681, 683, 69 S.Ct. 754, 755, 93 L.Ed. 971."

In *American Fidelity and Casualty Co. v. London and Edinburgh Insurance Co.,* 354 F.2d 214 (4th Cir. 1965) at page 216, the court pointed out that not only must the historic facts be free of controversy, "but also there must be no controversy as to the inferences to be drawn from them. It is often the case that although the basic facts are not in dispute, the parties nevertheless disagree as to the inferences which may properly be drawn. Under such circumstances the case is not one to be decided on a motion for summary judgment." This rationale was followed in *Cram v. Sun Insurance Office, Ltd.,* 375 F.2d 670 (4th Cir. 1967), which also involved the intent of contracting parties.

Until its action in the instant case, the Ninth Circuit has, on several occasions, followed this rule. Thus, in *Hycon Manufacturing Company v. H. Koch & Sons,* 219 F.2d 353 (9th Cir. 1955), a patent infringement case, both sides moved for summary judgment and the lower court granted plaintiff's motion. Unlike the instant case, where a contention that a genuine issue of fact in respect to the government's motion for summary judgment was actually put into issue, the parties there advised the court that the proof was documentary and all before the trial court. In its opinion, the Court observed:

"A motion for summary judgment cannot be granted simply because both sides move for it. [citing cases.] An indispensable prerequisite to such a judgment is the absence of a material

> question of fact. But it is obvious that there were postulates of fact involved in the diametrically opposite positions of the respective litigants. Both contentions of fact could not be true." 219 F.2d at 355.

The appellate court reversed and remanded for trial.

In *Hycon*, the court relied upon the principle in *Miller v. Wahyou*, 235 F.2d 612 (9th Cir. 1956), where in a concurring opinion, Judge Pope pointed out that notwithstanding the stipulation of the parties that they had no further evidence to offer, that stipulation was no longer effective when appellant's motion was overruled and appellants were free to raise a genuine issue of fact with respect to appellee's motion, citing *Begnaud v. White*, 170 F.2d 323 (6th Cir. 1948) and *F.A.R. Liquidating Corp. v. Brownell*, 209 F.2d 375 (3rd Cir. 1954). See also *Brawner v. Pearl Assurance Company*, 267 F.2d 45 (9th Cir. 1958); *Lloyd v. Franklin Life Insurance Co.*, 245 F.2d 896 (9th Cir. 1957).

No such stipulation was involved in this case. Had the matter not become moot because of taxpayers' successful motion, they were always prepared to adduce additional evidence if the government's theory of the case were to be adopted.[3]

That part of the judgment of the Court of Appeals in the instant action directing the lower court to enter judgment in favor of respondent without directing the lower court either to try the case or to consider whether or not taxpayers' contention as to the existence of

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[3]In fact, such additional evidence was submitted to the trial court after remand but it could not be considered because of the trial court's conclusion that the appellate mandate directed it to enter judgment for the government.

genuine issues of fact had validity is a clear forfeiture of petitioners' right to their day in court. Such a forfeiture is the very epitome of the absence of due process. In spite of the fact that the ultimate result was in favor of the government, its theory of the case did not form the basis of the appellate court's opinion. The government's basic factual contentions failed to survive that opinion (*Siegel v. United States,* 464 F.2d 891 (9th Cir. 1972) at p. 894) as of course did those of taxpayers.

To this point, taxpayers have seen the transaction classified as coming within rather than without the anticipatory assignment of income rule upon the basis of certain adverse factual postulates, adverse conclusions, adverse interpretations of ambiguous contractual provisions and adverse speculation. The irony of their plight is that all of these matters were for the first time raised, and concurrently with their raising, finalized by the Court of Appeals itself.

Yet this Court of Appeals has itself warned of its lack of authority to make new findings. In *Hycon Manufacturing Company v. H. Koch & Sons,* 219 F.2d 353 (9th Cir. 1955), at page 355, it said:

> "No authority is given except to District Courts to make new findings of fact. Presently our sole function as to such findings is to re-examine judicially, criticize and set aside if 'clearly erroneous'. The existence of the basis of fact in documentary form or in agreed statement of the parties does not transmute such propositions into questions of law."

citing *Waialua Agricultural Company v. Maneja,* 178 F.2d 603, 608 (9th Cir. 1949).

A particular finding based on conjecture appeared to weigh heavily against taxpayers. Speculating without justification from the record that taxpayers were reporting, as value received in liquidation, the contract rather than the photoplays to which the contract adhered, the Court of Appeals concluded that "[t]hey sought by this device to avoid taxation at the corporate level and to realize capital gain on receipt of the $300,000." In the face of taxpayers' contention throughout these proceedings that the $300,000 was their own rental income (and therefore ordinary income) and not that of Productions, the court's conclusion is puzzling. The question of taxpayers' capital gain or loss of dissolution and the appropriate method and rate of depreciating the property acquired by them on dissolution was at no stage of these proceedings ever placed into issue. The only evidence relating to the motive of that dissolution is to be found in the stipulation to the effect that the dissolution proceedings followed the exercise by Loew's of its option to renew Sol Siegel's individual employment contract. [R. 75.]

A new appellate finding, which the Court of Appeals characterized as significant, was that the 1958 amendment was made in exchange for, or in consideration of, completion and delivery of two specified photoplays. (464 F.2d at 892.) In point of fact, the parties had stipulated [R. 67-68] that the amendment had been entered into to settle a dispute between Productions and Loew's with respect, among other things, to the proper costs of the photoplays, which was an important element in determining the amount of rentals to be derived from the exploitation of the photoplays. Moreover, as to the first $150,000 of guaranteed film rental profits, the picture "MERRY ANDREW" *had*

already been completed, delivered and actually released by Loew's for exhibition. [R. 69.] There could be no question of services for either completion or delivery.

The appellate court's conclusion that the two $150,000 payments made by Loew's did not constitute rentals was perhaps its most significant finding *de novo* because it acknowledged in its opinion (464 F.2d at 894) that if in fact these payments were rentals for the use of property, the $300,000 would not have been fully earned until the expiration of the twenty-one year distribution period. Actually the written agreements characterized these payments as "on account of its [Productions'] share of the net profits" (rentals) to be recouped by Loew's. If, notwithstanding this characterization, the contract was sufficiently ambiguous to permit a factual conclusion that the payments were compensation for services, such a finding was necessarily one within the province of the trial court to be made after hearing the relevant evidence as to what the parties in fact meant. Taxpayers were entitled to the opportunity to present such relevant evidence.

Another finding *de novo* by the appellate court was that the "guarantee is expressly severed from any dependence on the earnings of the films." (464 F.2d at 895.) This is contrary to a first blush reading of the agreement which in its language reflects an interdependence between the potential payments of each of the $150,000 installments and the amounts then actually realized by the photoplays. Any such realized amounts were conceded by the government to constitute rentals from property, not compensation for services, notwithstanding the equivalent reduction of the $300,000 guarantee. If, however, the agreement could possibly embrace a different interpretation, the ultimate finding

as to its meaning again comes within the province not of the appellate court but of the trial court following a hearing, summary or otherwise, on the evidence.

In footnote 3 (at p. 893) the appellate court elaborates upon this concept as follows:

> "This non-returnable advance does not represent Productions' share of the photoplays' profits, since payment is in no way contingent upon the existence of any net profits."

This conclusion is obviously erroneous for several reasons. In fact, as is evident from the reading of the paragraph following that which is quoted in the footnote, the non-returnable advance would have been reduced to the extent of profits accruing prior to the due payment date, and a reading of the same contract paragraph demonstrates that if there were subsequent profits, to the extent thereof the advance would have been applied to such profits so that Loew's would have recouped the advanced payments. In and of themselves these types of errors are part of the ordinary hazards of litigation and would not normally justify the granting of a writ of certiorari. The hazard here involved, however, was not ordinary because until the appellate court wrote its opinion, taxpayers had no opportunity to present evidence the existence of which probably would have, and at the very least, might well have caused a trial court to make findings of fact different than those made and expressed by the Court of Appeals. It is the absence of that opportunity that constitutes the denial of due process. These material departures from the long line of contrary decisions protecting such due process suggests the need and propriety of supervision and correction by the Supreme Court.

The Court of Appeals' next step in its march to its conclusion that there was no need to give taxpayers their day in court on the government's motion involves the inference that the existence of a guarantee of a minimum amount payable by Loew's to Productions precludes such guaranteed payment from being for the use of property. There is no reason given, however, as to why the promise to pay a fixed minimum amount, with or without contingent additional amounts, is not as compatible with payment for use of property as it is for compensation for services rendered. Fixed payments for use of property are common every day occurences such as, for example, a fixed rental payment for the use of one's office or home. In the light of the fact that in the second appeal taxpayers were the opponents to the motion for summary judgment, without more the inference should have been drawn in taxpayers' favor to the effect that for summary judgment procedure purposes the guaranteed payments were to be deemed for the use of the photoplays.

But there was more. As stipulated by the parties in this case, the guaranteed minimum profits provision was expressly agreed upon to settle the controversy involving taxpayers' contention that Loew's was overcharging for its facilities and over-stating its contributions to costs. The cost of each photoplay had a direct relationship to the generation of net profits. It had no relationship to compensation for services. By this provision, Loew's and Productions, in effect, were simply liquidating an unliquidated contingent claim for net profits, that is, film rentals. Accordingly, the proceeds of that settlement should have been deemed to be film rentals, at least for summary judgment purposes. See *Hort v. Commissioner*, 313 U.S. 28 (1941); *Commis-*

sioner v. Gillette Motor Transport, Inc., 364 U.S. 130, 80 S.Ct. 1497 (1960); *Lyeth v. Hoey*, 305 U.S. 188, 59 S.Ct. 155 (1938) and *United States v. Midland-Ross Corp.*, 381 U.S. 54, 85 S.Ct. 1308 (1965).

That the Court of Appeals overlooked this point is not surprising because when it wrote its opinion, it was, as it should then have been, addressing itself from the point of view of the government, the opponent of a successful cross-motion for summary judgment. To go further, however, and to carry forward the same point of view when later dealing with taxpayers' opposition to a successful summary judgment against them, deprived taxpayers of the opportunity to adduce evidence to support their factual contentions as to the intent and meaning of the contractual provision. The fact is, that in the light of the principles applicable to summary judgment procedure, it would be literally impossible in circumstances here presented to have the same opinion addressed to a summary judgment by taxpayers as one addressed to a summary judgment by the government.

The Court of Appeals next introduced another theory of the case unmentioned in the papers submitted either by the government or by the taxpayers in support of their respective motions in the trial court, and unmentioned by either the government or the taxpayers in their briefs addressed to the Court of Appeals. The entire line of reasoning and factual conclusions expressed by the Court of Appeals, commencing with its conclusion "[t]he arrangement between Loew's and Productions was essentially a joint venture" (464 F. 2d at pp. 895-6) through the end of its opinion (exclusive of the last two paragraphs disposing of the case) demonstrated why the Court of Appeals believed that the transaction came within the concept of anticipatory

assignment of income. None of the steps in its reasoning, including the factual conclusions it reached in that process, had been raised or argued in the court below. Yet included in this final rationale by the Court of Appeals were the following findings and postulates:

i. "The arrangement between Loew's and Productions was essentially a joint venture." (pp. 895-6.)

ii. The profitability of the motion pictures was highly speculative and Productions did not incur the full risk associated with the ownership of the photoplays. (p. 896.)

iii. ". . . in the context of the movie industry, insulation from financial risk is a helpful touchstone for characterizing transactions in which elements of earnings for services are commingled with elements of return upon ownership of property." (p. 896.)

Had taxpayers been told that these were the elements upon which this case should be properly decided, they would have been able to point out that the contracting parties had expressly provided that neither was to be the agent or partner of the other. [R. 216.] They would also have been able to adduce oral evidence that the contracting parties in their negotiations and in their contract intended to avoid the creation of a partnership or joint venture. [R. 464, 468-470.]

As to the impact of the newly introduced postulates that the amount of risk which Productions incurred was material or that the profitability of these movies was highly speculative, taxpayers would have been able to point to many facts tending to controvert this conclusion. More important, perhaps, they would have

been enabled to adduce evidence with respect to the specific photoplays in question so that the trial court would have had available before it facts which would enable it to decide the question of the risk and the probability of profits.

Finally in this connection, the Court of Appeals first introduced into this case the proposition that the transaction herein, involving elements of earnings for services with elements of return upon ownership of property, classification of which it acknowledged "is not always marked with dazzling clarity" (p. 894), required a touchstone to determine the appropriate characterization of the transaction. The Court then chose insulation from financial risk as the appropriate touchstone but without guidance from any of the parties. Even if the appellate judges happened to have expertise in the industry involved, it would be an extremely dangerous precedent to permit a court of appeals to select, without prior warning to the litigants, a particular touchstone with which it might happen to be familiar or believe itself to be familiar for the purpose of characterizing a given business transaction, the underlying facts of which have not been fully raised or tested in a lower court.

In and of itself the refusal of the Court of Appeals to permit a hearing on whether or not there were genuine issues of fact in opposition to the government's motion was error resulting in denial of due process. That error was compounded by the Court of Appeals' apparent assumption that because the contract between

Productions and Loew's was in writing, the Court was free, by reason of the parol evidence rule, to makes its own findings with respect to the rights and intentions of the parties to the contract. Even if this contract of over 175 pages were considerably less complex, such assumption would have been erroneous.

The contract was to be governed by the law of California [R. 220], where it was to be performed and accordingly the California rule relating to parol evidence was applicable. *Severson v. Fleck*, 251 F.2d 920, 923 (8th Cir. 1958); *Producers Livestock Loan Co. v. Idaho Livestock Auction Inc.*, 230 F.2d 892 at 894 (9th Cir. 1956). Under *Pacific Gas & Electric Company v. G. W. Thomas Drayage & Rigging Company, Inc.*, 69 Cal.2d 33 (1968), the California rule is stated by Chief Justice Traynor, at page 37, as follows:

> "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. [citing cases].
>
> "A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained."

In short, the parol evidence rule has an extremely limited validity in California.

Had taxpayers been afforded an opportunity to adduce evidence to demonstrate that the intent of the contracting parties was other than as found by the Court of Appeals, they would have had available, in support of their contention, testimony from negotiators for both parties to the Loew's Productions contract. [R. 464, 468-470.]

In the instant action, denial of due process is aggravated because taxpayers, believing under their theory of the case that they were entitled to judgment without resort to facts which would have been responsive if the government's theory of the case prevailed, sought to shorten the litigation by filing a cross-motion. Had taxpayers not filed such a cross-motion for summary judgment but had simply been content to resist the government's motion, there would be no question but that taxpayers would have had their day in court to adduce testimony on all material facts. Accordingly, the practical effect of the Court of Appeals' judgment in the instant action must be to discourage counsel generally from utilizing the summary judgment technique with its attendant saving of time and effort to litigants, their counsel and the courts concerned. Under circumstances similar to those of the instant case, a lawyer who believed that apart from his own theory of the case, he also had a factual defense if his opponent's theory of the case prevailed, could never properly jeopardize a hearing on his client's factual defense by cooperating in a cross-summary judgment procedure.

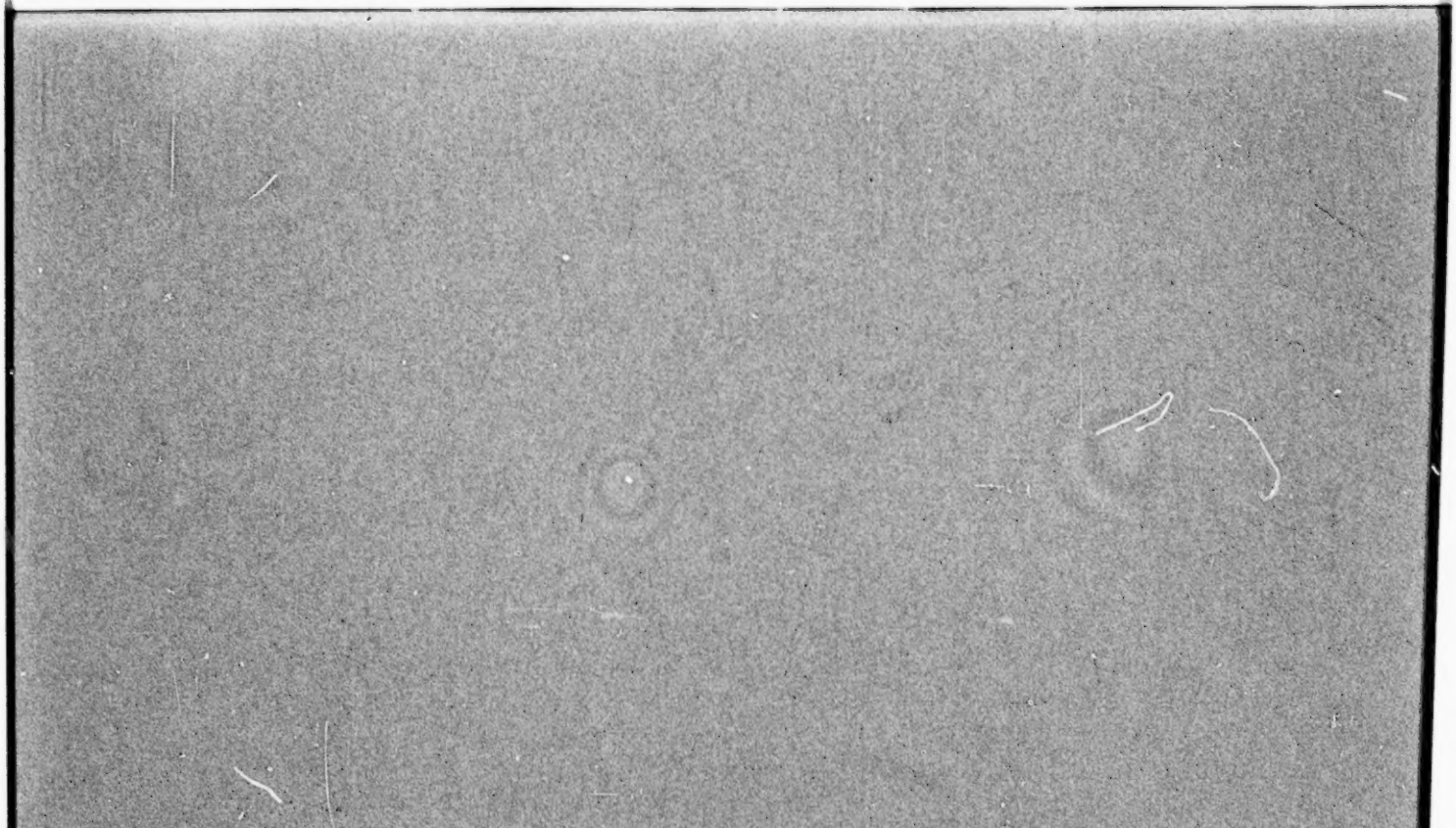
Conclusion.

The question presented is one of substantial importance. The Court of Appeals' decision is in conflict with, and has departed from prior holdings of the Supreme Court, prior holdings of the Ninth Circuit itself and prior holdings of other Courts of Appeals. More important, by foreclosing a successful party from being heard on his opponent's summary judgment motion in the event of a reversal of his own successful motion, it injects into the summary judgment procedure an inherent element of lack of due process.

Respectfully submitted,

JACOB SHEARER,
Attorney for Petitioners.

SHEARER, FIELDS, ROHNER &
SHEARER,
Of Counsel.



APPENDIX A.

Memorandum.

DO NOT PUBLISH

United States Court of Appeals, for the Ninth Circuit.

Sol C. Siegel, *Plaintiff-Appellant*, vs. United States of America, *Defendant-Appellee*. No. 73-1877.

Ethel B. Siegel, *Plaintiff-Appellant*, vs. United States of America, *Defendant-Appellee*. No. 73-1878.

[June 5, 1974].

Appeals from the United States District Court for the Central District of California.

Before: CHAMBERS and DUNIWAY, Circuit Judges, and EAST,* District Judge.

The judgment is affirmed.

The only real issue was concluded against appellants in the prior appeal: *Siegel v. United States*, 464 F.2d 891 (9th Cir. 1972).

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*The Honorable William G. East, Senior United States District Judge, sitting by designation.

APPENDIX B.

Civil Minutes—General.

Central District of California.

Date 1/16/73.

Case No. 69-167-JWC, 69-168-JWC.

Title Ethel B. Siegel v. U.S.A. and Sol C. Siegel v. U.S.A.

Docket Entry Defendant's motion for summary judgment is hereby granted.

Siegel v. United States, 464 F.2d 891.

Counsel notified.

Present: Hon. Jesse W. Curtis, Judge; N. E. Brockman, Deputy Clerk. Not Present, Court Reporter.

Attorneys Present for Plaintiffs: Not Present.

Attorneys Present for Defendants: Not Present.

Proceedings:

APPENDIX C.

Sol C. Siegel, Plaintiff-Appellee v. United States of America, Defendant-Appellant.

Ethel B. Siegel, Plaintiff-Appellee, v. United States of America, Defendant-Appellant. Nos. 26398, 26399.

United States Court of Appeals, Ninth Circuit. July 11, 1972.

As Amended on Denial of Rehearing Aug. 25, 1972.

Actions for refund of income taxes. The United States District Court for the Central District of California, Jesse W. Curtis, J., found for taxpayers and government appealed. The Court of Appeals, Eugene A. Wright, Circuit Judge, held that guaranteed amounts unconditionally payable to corporation under motion picture production contract constituted taxable income to corporation in taxable years income was collected even though corporation reported its income on cash basis and had assigned its right to receive the income to its shareholders who collected it.

Reversed.

Ernest J. Brown (argued), Harry Baum, Joseph M. Howard, Scott P. Crampton, Asst. Atty. Gen., Washington, D. C., Mason C. Lewis, Asst. U.S. Atty., Robert L. Meyer, U.S. Atty., Los Angeles, Cal., for appellant.

Jacob Shearer (argued), of Shearer, Fields, Rohner & Shearer, Los Angeles, Cal., for appellees.

Before KOELSCH, WRIGHT, and TRASK, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

In these actions for refund of income taxes, the issue presented is whether fixed guaranteed amounts

unconditionally payable to Sol C. Siegel Productions, Inc. under a motion picture production contract constituted taxable income to the corporation in the taxable years the income was collected, notwithstanding that the corporation reported its income on the cash basis and had assigned its right to receive the income (by way of a liquidation distribution) to its shareholders (the taxpayers-transferees) who then collected it. The Commissioner had attacked the distribution as an anticipatory assignment of income earned by and taxable to the corporation. The district court gave judgment to the plaintiffs. We reverse.

Mr. Siegel, a producer of motion pictures, was president and controlling shareholder of Productions. That corporation formed a joint venture in 1955 with Loew's Inc., a major studio, for the production and distribution of a number of photoplays. The terms of the agreement were complex,[1] but provided basically that Productions would furnish its skill in making films and Loew's would pay production costs and would distribute the end product.[2] The two companies would own the photoplays as tenants in common of a copyright and would divide any profits.

A significant amendment was added in 1958, when Loew's agreed to guarantee payment to Productions of

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[1]A detailed account of the business dealings between Loew's and Productions may be found in Sol C. Siegel Productions, Inc. v. Commissioner, 46 T.C. 15 (1966), a related case.

[2]Actually, Productions was to "furnish" financing for 25 percent of the film cost, but Loew's agreed to loan the necessary money to Productions interest free. The "loan" would be secured by a first mortgage on Productions' interest in the photoplays. Loew's agreed to look only to this collateral for security, and to waive any right to a deficiency judgment if gross receipts from the films were insufficient to repay the loan. Given this arrangement, we think it realistic to say that Loew's alone financed the productions.

$300,000 in exchange for the completion and delivery of two specified photoplays.[3] The right of Productions to receive that amount became fixed when the plays were finished, but payment was deferred. Loew's was to pay $150,000 on June 1, 1961, for the first film, and a like amount for the second film on June 1, 1962. The first picture was completed and delivered early in 1958, the second by February 1959.

Well before the first payment became due in 1961, Productions began proceedings for voluntary dissolution. On March 21, 1961 the corporation delivered to its shareholders a general assignment that gave them

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[3]The contract expresses the guarantee in these terms:

"With respect to Unit A [two specified films], the Distributor [Loew's] agrees that if both of the photoplays of said Unit shall be completed and delivered to Distributor, Productions' share of the aggregate net profits from said Unit shall be not less than THREE HUNDRED THOUSAND DOLLARS ($300,000)

(a) If on June 1, 1961, Productions' share of said net profits paid or payable to Productions shall be less than ONE HUNDRED FIFTY THOUSAND DOLLARS ($150,000), Distributor shall pay to Productions the amount by which $150,000 exceeds Productions' share of said net profits.

(b) If on June 1, 1962, both of the photoplays of said Unit have been delivered to Distributor and Productions' share of said aggregate net profits paid or payable to Productions shall be less than THREE HUNDRED THOUSAND DOLLARS ($300,000), Distributor shall pay Productions the amount by which $300,000 exceeds Productions' share of the net profits of said photoplays. If the Distributor shall be required to pay Productions any amount on account of its undertaking hereunder and shall pay said amount, such shall be deemed to constitute a *non-returnable payment* to Productions on account of its share of the net profits from the photoplays in said Unit A. (emphasis supplied)

This non-returnable advance does not represent Productions' share of the photoplays' profits, since payment is in no way contingent upon the existence of any net profits.

undivided interests in all its assets, other than cash and a contract with a screenwriter. These assets included Productions' ownership interest in the photoplays it had produced pursuant to the joint venture with Loew's, as well as the contractual right to receive payment of $300,000. Loew's later paid the $300,000 to the shareholders on schedule.

The corporation kept its accounts on the cash receipts and disbursements basis, and adopted a fiscal year ending May 31. Mr. and Mrs. Siegel asserted that the $300,000 did not constitute income to the corporation, because it had assigned away its income right prior to the fiscal year in which Loew's paid it. They sought by this device to avoid taxation at the corporate level and to realize capital gain on the receipt of the $300,000. Upon distribution of the contractual right to receive the income, the shareholders would receive a fair market value basis in the right, paying a capital gain tax on the difference between their adjusted stock basis and the fair market value of the income right. When the $300,000 was paid the shareholders would pay tax at the ordinary rate upon only the difference between their stepped up basis in the contractual right and the amount of the payment. The result would be to transform income from the production and distribution of movies, normally ordinary income, into capital gain.

The Commission first attacked this transaction by asserting that the $300,000 should be included in Productions' gross income for the fiscal year in which the assignment occurred. The Tax Court disagreed, holding that since the corporation continued to exist and file federal tax returns for several more years the appropriate time for taxation should be the date of payment

rather than the date of the assignment. Sol C. Siegel Productions, Inc. v. Commissioner, 46 T.C. 15 (1966).

The Tax Court has determined *when* the right to these payments generated income. Our problem is to determine whether the corporation or its shareholders should have reported that income.

This case presents an intersection between two general doctrines in assignment of income theory. It has been held that income from property is taxed to the owner of the underlying property right at the time the income accrued. *See, e.g.*, Helvering v. Horst, 311 U.S. 112, 118-119, 61 S.Ct. 144, 85 L.Ed. 75 (1940); Blair v. Commissioner of Internal Revenue, 300 U.S. 5, 57 S.Ct. 330, 81 L.Ed. 465 (1937). On the other hand, it has been held that income should be taxed to its earner. *See, e.g.*, Helvering v. Eubank, 311 U.S. 122, 61 S.Ct. 149, 85 L.Ed. 81 (1940); Lucas v. Earl, 281 U.S. 111, 50 S.Ct. 241, 74 L.Ed. 731 (1930). These intra-family gift decisions establish the basic framework for inquiry into assignments of income problems.[4] Subject to certain qualifications not here relevant, assignment of income principles apply to corporate distributions as broadly as they do to intra-family gifts.[5]

Courts have had difficulty in deciding into which category a given item of income falls, since the line between earned income and income from property is not always marked with dazzling clarity. An example is the situation found here, in which a taxpayer em-

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[4] *See* Lyon & Eustice, Assignment of Income: Fruit and Tree As Irrigated by the P. G. Lake Case, 17 Tax L.Rev. 295, 296-301 (1962).

[5] See Lyon & Eustice, *supra* note 5, at 396-98.

ploys its skills to create a valuable property interest in the photoplay copyrights.

The Siegels argue that the $300,000 guarantee represents income produced by their property interest in the photoplays. They characterize the payment as rental paid by Loew's for exclusive control over the manner of exploitation of the photoplays throughout the 21 year distribution period contemplated by the contract. They contend this arrangement is analogous to an agreement by one cotenant to allow another the exclusive possession of their jointly held property for a term of years. Applying Justice Holmes' classic metaphor, they say the payment is the fruit of the tree representing their property right in the photoplays.[6] It follows, they say, that the income must be taxed to whoever owned the property at the time of payment.

The Commissioner views this transaction in an entirely different aspect, arguing that the right to the payment was fully earned by the corporation when it completed and delivered the two photoplays, long before the time of assignment. From this perspective, the $300,000 represents a guaranteed minimum compensation to Productions in return for its services in creating the photoplays. The Commissioner also argues that the corporation should be taxed even if the $300,000 is treated as income from property.

An owner of property cannot escape taxation on its income by transferring the property in the interval between the time the income accrues and the time it is paid. *See, e.g.,* United States v. Lynch, 192 F.2d 718, 721 (9th Cir. 1951), cert. denied, 343 U.S.

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[6]Lucas v. Earl, 281 U.S. 111, 115, 50 S.Ct. 241, 74 L.Ed. 731 (1930).

934, 72 S.Ct. 770, 96 L.Ed. 1342 (1952) (corporation distributed right to receive warehouse storage fees for goods stored in months prior to the liquidation); Idaho First National Bank v. United States, 265 F.2d 6 (9th Cir. 1959) (bank transferred to its shareholders notes which had accrued overdue interest).

Yet if the $300,000 payment is rental paid by Loew's in return for Productions' agreement to allow Loew's exclusive control over exploitation of their jointly held copyright, then we assume the $300,000 would not have been fully earned until the expiration of the 21 year distribution period. For this reason the cases cited by the Commissioner are inapposite, and we cannot accept his theory that the corporation had fully earned the right to the $300,000 even if the payment is considered rental.

We also declined to adopt the approach taken by the district court, which appears to have interpreted the guarantee as a mere reshuffling of priorities on receipts of the films' earnings. That is, instead of applying money from exhibition of the movies initially to costs of production and distribution, the first $300,000 in earnings from the films would be given to Productions as a return on its property interest.

We reject this approach primarily because the guarantee is expressly severed from any dependence on the earnings of the films. As we read the contract, the $300,000 was to be paid without regard to the financial success or failure of the films. It was not payable from any specified fund; rather Loew's became unconditionally obligated to make the future payments on completion of Productions' services in making the photoplays.

The Siegels seek to support the district court's decision by reference to frustration-of-contract cases, which hold that performance of a contract will be excused upon the destruction of an object or person whose existence provided the basic purpose of the contract. *See, e.g.,* La Cumbre Golf and Country Club v. Santa Barbara Hotel Co., 205 Cal. 422, 271 P. 476 (1928). The taxpayers argue, and the district court apparently agreed, that destruction of the photoplays prior to exhibition would effectively cancel the obligation to pay $300,000. No express condition in the contract so provides. A judicial decision about whether to imply such a condition must necessarily beg the question presented about the nature of the payments.

If the payments promised were in exchange for Productions' services, then the $300,000 would be payable even though the completed films were never exhibited. If the payments were rentals for the 21 year distribution period, then destruction of the film would probably excuse performance of the promise. In short, the frustration-of-contract cases do nothing to advance analysis of our assignment of income question, for either position begs the basic question involved here.

The Tax Court, in dictum, adopted the Commissioner's view of the transaction. When the Commissioner first attacked this distribution, the Siegels had argued to the Tax Court (1) the payment could not be taxed to the corporation in any event since title had passed to the shareholders, and (2) the Commissioner had chosen the wrong tax year. Although it rested its decision upon the second ground, the Tax Court did express its opinion on the assignment of income question:

"Petitioner's first point appears to rest upon highly doubtful grounds. When it made the March 21, 1961, assignment to its shareholders, its right to receive the $300,000 profit, as we read paragraph 5 of the agreement, had become indefeasibly fixed, and only a lapse of time until June 1, 1961, and June 1, 1962, was to occur prior to actual payment. It had performed all the services required of it under the Loew's Agreement, as amended, and had only to await the expiration of the allotted period of time to collect its guaranteed income. In the circumstances, since petitioner's right to the profits had already become fully vested and since the operation of the statute in this area does not turn upon 'attenuated subtleties,' it would seem that petitioner could not avoid tax on such profits by any kind of 'anticipatory arrangements and contracts however skillfully devised.' Lucas v. Earl, 281 U.S. 111, 114, 115 [50 S.Ct. 241, 74 L.Ed. 731]; Harrison v. Schaffner, 312 U.S. 579, 581, 582, 583 [61 S.Ct. 759, 85 L.Ed. 1055]; Helvering v. Horst, 311 U.S. 112 [61 S.Ct. 144, 85 L.Ed. 75]; Helvering v. Eubank, 311 U.S. 122 [61 S.Ct. 149, 85 L.Ed. 81]; Commissioner v. First State Bank of Stratford, 168 F.2d 1004 (C.A.5); Wood Harmon Corporation v. United States, 311 F.2d 918 (C.A.2)." Sol C. Siegel Productions, Inc. v. Commissioner, 46 T.C. 15, 23 (1966).

We believe this to be the correct approach. The arrangement between Loew's and Productions was essentially a joint venture. Loew's furnished cash, studio facilities, its distribution network, and its expertise in sales promotion. Productions furnished the talents of

Sol Siegel and his production crew. The joint venturers produced several movies for which Productions received only its percentage share of any profits earned by the films after all costs had been recovered. Then the 1958 amendment minimized Productions' entrepreneurial risk by guaranteeing it a minimum return of $300,000 in return for its contribution to the joint venture.

In these circumstances we believe the guaranteed income right payable from one joint venturer to the other should be treated as compensation for the latter's contribution to the project. Productions did not incur the full risk associated with ownership of rights in movies whose profitability was highly speculative.

To the extent that the Loew's guarantee shielded Productions from the risk normally associated with ownership of unreleased movies, we think it reasonable to treat Productions as the beneficiary of a contract right to receive earned income, rather than as a joint venturer receiving income from ownership of property. At least in the context of the movie industry, insulation from financial risk is a helpful touchstone for characterizing transactions in which elements of earnings for services are commingled with elements of return upon ownership of property.

We conclude that the corporation had fully earned the $300,000 prior to the date it assigned the right to receive the payments. Accordingly the Commissioner correctly determined that the payments must be included in the gross income of the corporation.

The judgment of the district court is reversed.

APPENDIX D.

Order.

In the United States Court of Appeals for the Ninth Circuit.

Sol C. Siegel, Plaintiff-Appellee, v. United States of America, Defendant-Appellant. No. 26,398.

Elaine [sic] B. Siegel, Plaintiff-Appellee, v. United States of America, Defendant-Appellant. No. 26,399. Before: KOELSCH, WRIGHT and TRASK, Circuit Judges.

The Petition for Rehearing has been considered and is denied.

The Motion for Clarification has been considered and it is hereby

ORDERED, that the court's opinion of July 11, 1972 be amended by deletion of the last sentence on page 7 and the first sentence on the top of page 8 of the slip opinion.

DATED:

Note:

The portion of the opinion deleted pursuant to the above read as follows:

". . . Since the success of the photoplays was contingent upon unpredictable market factors, the parties had no way of knowing whether $300,000 was a reasonable minimum value for Productions' agreement to allow Loew's exclusive control over exploitation of the movies. But a market value did exist for the proven movie-making skills of Sol Siegel and his production staff."

These words originally formed the last two sentences of the fourth last paragraph of the opinion (Appendix "C").

APPENDIX E.

Findings of Fact and Conclusions of Law.

United States District Court, Central District of California.

Ethel B. Siegel, Plaintiff, v. United States of America, Defendant.

Sol C. Siegel, Plaintiff, v. United States of America, Defendant. No. 69-167-JWC Civil, No. 69-168-JWC Civil.

FINDINGS OF FACT

FILED: April 3, 1970.

Incorporated by reference as the Court's findings of fact in this matter is the Stipulation of Agreed Facts attached to defendant's motion for summary judgment.

CONCLUSIONS OF LAW

I

This court has jurisdiction over the subject matter of this action, and venue is proper. 26 USCA §7422; 28 USCA §§1346(a)(1) and 1402(a)(1).

II

There being no genuine issue as to any material fact and it appearing that plaintiff is entitled to judgment as a matter of law, this case appropriately is susceptible of disposition by way of summary judgment. Rule 56, Federal Rules of Civil Procedure.

III

The two payments of $150,000.00 each by Loew's to the plaintiffs (on June 1, 1961 and June 1, 1962) constituted an advance against revenues to be derived from the motion pictures "MERRY ANDREW" and "THE WORLD, THE FLESH AND THE DEVIL"

and are not taxable to Sol C. Siegel Productions, Inc. or to plaintiffs as its transferees. These payments did not represent income earned by the Corporation prior to the transfer of the assets to its stockholders pursuant to the Corporation's plan of liquidation. These payments were not for services rendered by the Corporation prior to the transfer of its interest in the pictures "THE WORLD, THE FLESH AND THE DEVIL" and "MERRY ANDREW" to plaintiffs.

IV

The Commissioner of Internal Revenue improperly entered his assessment against plaintiffs as transferees of Sol C. Siegel Productions, Inc. for the corporate tax liability for the taxable years ended May 31, 1962 and May 31, 1963. Transferees are entitled to the refund of all moneys paid by them, interest thereon and their costs of suit.

DATED: April 3, 1970.

/s/ JESSE W. CURTIS
UNITED STATES DISTRICT JUDGE

APPENDIX F.

Office of the Clerk
United States Court of Appeals for the Ninth Circuit
U.S. Court of Appeals and Post Office Building
7th & Mission Streets, P. O. Box 547
San Francisco, California 94101

June 5, 1974

Re: No. 73-1877 SOL C. SIEGEL VS. USA
73-1878 ETHEL B. SIEGEL VS. USA

Dear Sir:

A memorandum in the above case was filed today, and pursuant to Rule 36 of the Federal Rules of Appellate Procedure a judgment was entered 6-5-74 affirming the judgment or order of the court below (or administrative agency).

Pursuant to Rule 41(a) the mandate of this court will issue 21 days after the entry of judgment, unless the court enters an order otherwise, or grants a stay of the mandate or a petition for rehearing is filed. If a petition for rehearing is filed and denied, the mandate shall issue 7 days after the entry of the order denying the petition.

Very truly yours,

Clerk
U.S. Court of Appeals

APPENDIX G.

Rule Involved.

Rule 56. Summary Judgment

. . . .

(c) Motion and Proceedings Thereon . . . The judgment sought shall be rendered forthwith if the pleadings, . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . .

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-180

SOL C. SIEGEL AND ETHEL B. SIEGEL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question presented by the petition in this income tax refund case is whether summary judgments were properly entered in favor of the government after the court of appeals on the first appeal reversed the summary judgments originally entered for petitioners in the district court. Petitioners claim that there still remains a triable issue of fact.

1. The pertinent facts, which are set forth in an extensive stipulation, are as follows. Petitioner Sol C. Siegel was President of Sol C. Siegel Productions, Inc. ("Productions"), and owned more than 85 percent of its stock. Petitioner Ethel B. Siegel owned more than 4 percent. They brought these suits for refund of income taxes assessed and paid by them as transferees of Productions for its taxable years ended May 31, 1962 and 1963 (Pet. App. C 3-4).

The substantive tax controversy had been previously litigated in the Tax Court. It arose out of a contract between Productions and Loew's, Inc. ("Loew's"), under which Productions was to produce, and Loew's was to finance and distribute, a number of motion pictures. After costs and expenses were recovered, profits, if any, were to be divided. As a result of disagreements and the desire of Loew's to employ petitioner Sol C. Siegel, these agreements were amended so that if Productions completed and delivered two specified motion pictures, Loew's guaranteed payment of $300,000 to Productions, half on June 1, 1961 and half on June 1, 1962. The motion pictures were completed and delivered, but prior to the first date for payment, Productions voted to liquidate. On March 21, 1961, Productions delivered to its shareholders, including petitioners, the right to the payments to be made on June 1, 1961 and 1962. Loew's made the payments to the shareholders on schedule (Pet. App. C 4-6).

The Commissioner of Internal Revenue asserted a deficiency against Productions on the ground that the payments to the shareholders were income of Productions for its taxable year ended May 31, 1961, the year of its liquidation. The Tax Court indicated that the payments were income of Productions, but held that they were not income in the only year before the court, Productions' taxable year ended May 31, 1961. See *Sol C. Siegel Productions, Inc.* v. *Commissioner*, 46 T.C. 15 (Pet. App. C 6-7, 10-11). The Commissioner thereafter assessed deficiencies against petitioners as transferees of Productions for its taxable years ended May 31, 1962 and 1963, the years of payment. Petitioners acknowledged that they were transferers, paid the taxes assessed, and brought these suits for refund (Pet. App. C 6).

In this litigation, the parties submitted to the district court a lengthy stipulation of agreed facts (R. 62-80),[1] accompanied by documentary attachments of more than two hundred pages (R. 81-348), stating that they had compiled "a mutually acceptable and complete Stipulation of Agreed Facts which will be incorporated as part of defendant's motion for summary judgment" (R. 42-43), and filed cross-motions for summary judgments. The district court, reciting that there was "no genuine issue as to any material fact," entered judgments for petitioners (Pet. App. E 14-15). On the first appeal, the court of appeals reversed (Pet. App. C 3-12), concluding that "the Commissioner correctly determined that the payments must be included in the gross income of the corporation" (Pet. App. C 12).

Petitioners thereupon filed a Motion for Clarification and Petition for Rehearing in the court of appeals, contending that the opinion of the court appeared to contemplate entry of judgments for the United States and seeking, instead, that the case be remanded for further proceedings. Except for deleting two sentences from its opinion, the court of appeals denied this motion (Pet. App. D 13) and its judgment was filed and spread upon the minutes of the district court (R. 424).

Upon petitioners' motion (R. 425-426), the district court vacated the judgments for the United States

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[1] "R." references are to the record in the court of appeals in *Ethel B. Siegel* v. *United States*. Because of the length of the stipulation of facts and documentary attachments, these materials were incorporated only by reference in the record in *Sol. C. Siegel* v. *United States*.

entered on the mandate of the court of appeals, and stated that the original motion of the United States for summary judgment would be deemed to be before the court, subject to the right of petitioners to file additional points and authorities (R. 447). Thereafter, petitioners submitted a memorandum (R. 449-457) and the affidavits of four prospective witnesses (R. 459-470) in support of their position that there remained a triable issue of fact. After considering this additional material, the district court entered judgments for the United States (Pet. App. B2). The court of appeals affirmed *per curiam* (Pet. App. A1).

2. As this court pointed out in *First Nat. Bank* v. *Cities Service Co.*, 391 U.S. 253, 259, "[T]he question whether summary judgment is appropriate in any case is one to be decided upon the particular facts of that case." Here, after the issues had been once litigated in the Tax Court, the parties submitted to the district court a stipulation of facts with documentary attachments that they agreed was "mutually acceptable and complete." The 1958 contract between Productions and Loew's established the right of Productions to payments of $300,000. Its terms and the circumstances of its making established that these payments had been earned by Productions and constituted income to Productions under this Court's decision in *Lucas* v. *Earl*, 281 U.S. 111.

It is well settled that the disputed construction of a contract is an issue appropriate for resolution by summary judgment. *Green* v. *Valve Corp. of America*, 428 F. 2d 342 (C.A. 7); *Universal Fiberglass Corp.* v. *United States*, 400 F. 2d 926 (C.A. 8). Where, as here, the construction of a contract is determinative of the

contested issue, it is appropriate for an appellate court, if it rejects the construction of the lower court, not only to reverse a summary judgment but also to order judgment for the other party. *Procter & Gamble Ind. Union* v. *Procter & Gamble Mfg. Co.*, 312 F. 2d 181 (C.A. 2); *Stein* v. *Oshinsky*, 348 F. 2d 999 (C.A. 2), certiorari denied, 382 U.S. 957. Thus, the court of appeals correctly ordered judgment for the United States on the first appeal.

But that was not the end of this extended litigation. The district court vacated the judgment that had been routinely entered on the mandate of the court of appeals and afforded petitioners an additional opportunity to argue that a triable issue of fact remained. After consideration of petitioners' argument and affidavits setting forth the evidence they sought to introduce, the district court entered judgments for the United States and the court of appeals affirmed. Thus, there is no reason for this Court to review the judgment of both courts below that there is no triable issue of fact remaining in this litigation.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.